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Tideway Alliance Sdn Bhd v Daya OCI Sdn Bhd

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HIGH COURT (SHAH ALAM) — SUIT NO 22C-3-04 OF 2015
SEE MEE CHUN J
15 FEBRUARY 2016

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Contract — Building contract — Breach — Contract for rock dumping works at sea — Claim by plaintiff for payment for works done — Whether plaintiff delayed in commencement of work — Whether temporary demobilisation of work due to unfavorable weather and sea condition amounted to abandonment of work — Whether amounted to refusal to perform by plaintiff — Whether contract discharged — Whether defendant justified in employing third party to complete works

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Pursuant to letter of award ('LOA'), the plaintiff was appointed by defendant as the subcontractor for rock dumping works at the sea designated under defendant's project ('the work'). The plaintiff was required to provide and mobilise personnel, machinery and vessel spread for the onshore and off shore rock dumping work. The defendant had in turn been appointed by TLO Offshore S/B ('TLO') with the ultimate employer being Petronas Carigali S/B ('PCSB'). The plaintiff brought this claim for the balance sum for work done amounting to RM6,937,500. The defendant resisted the claim alleging a breach of contract and the defendant counterclaimed for the cost of completion. The plaintiff contended that the delay in commencement of work was caused by the ultimate employer not approving the vessel proposed by the plaintiff to carry out the work. The plaintiff further contended that there had been a temporary demobilisation of work due to unfavorable weather and sea condition. The defendant claimed that this amounted to an abandonment of work.

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Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim with costs:

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(1) Although the ultimate employer had the authority to reject vessels and it was the plaintiff's responsibility to procure suitable vessels this had to be viewed in the context of no issue being raised on the purported delay especially when offshore work only commenced on 18 October 2013 (see para 10).

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(2) The weather in late November to mid December 2013 was bad prompting no offshore work to be done. All these circumstances coupled with the defendant's own letter to TLO proposing temporary demobilisation due to unfavorable weather and sea condition made the

request for temporary demobilisation reasonable as it was based on concrete evidence of bad weather condition. Under the circumstances there was never any intention of abandonment or repudiation by the plaintiff or offer to the defendant to take over the work as suggested by the defendant. There was no absolute refusal by the plaintiff to perform the work such that the defendant could treat itself as discharged (see paras 19 & 25).

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- (3) As to whether the defendant's letter of 13 December 2013 amounted to termination, DW3 conceded there was no termination letter issued by the defendant to the plaintiff ending/terminating the contract. Even if it could be said to be a termination letter, the defendant was not justified in terminating as the plaintiff had only requested for temporary demobilisation in the face of bad weather. As there had been no repudiation or abandonment of work by the plaintiff, it did not lie on the defendant to assert it was entitled to accept the repudiation and claim all damages (see para 26).

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- (4) The plaintiff had not breached the LOA as there was no delay on onshore work and it had not been able to complete offshore work due to the weather. There had only been temporary demobilisation and no abandonment of work. There had been no termination by defendant entitling it to appoint the third party contractor HSAP Sdn Bhd. The award of the work to the third party contractor had denied the plaintiff the balance payment of the work. Since the plaintiff was ready and willing to resume the offshore work once the weather improved as per its letter of 13 December 2013, it was entitled to the benefit of the LOA (see paras 27–28).

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[Bahasa Malaysia summary]

Berikutan surat award ('SA'), plaintiff dilantik oleh defendan sebagai subkontraktor bagi kerja-kerja lambakan batu di laut dinyatakan di bawah projek defendan ('kerja tersebut'). Plaintiff dikehendaki untuk menyediakan kakitangan yang bersiap sedia, mesin dan kapal direntangkan untuk kerja lambakan batu di darat dan di luar pesisir. Defendan sebaliknya dilantik oleh TLO Offshore S/B ('TLO') dengan majikan utamanya adalah Petronas Carigali S/B ('PCSB'). Plaintiff membawa tuntutan ini bagi jumlah baki bagi kerja yang dijalankan berjumlah sebanyak RM6,937,500. Defendan menentang tuntutan tersebut dengan mendakwa melanggar kontrak dan defendan menuntut balas bagi kos penyiapan. Plaintiff berhujah bahawa kelewatan dalam permulaan kerja disebabkan oleh majikan utama tidak meluluskan kapal yang dicadangkan oleh plaintiff untuk menjalankan kerja tersebut. Plaintiff selanjutnya berhujah bahawa terdapat pemberhentian kerja sementara akibat kepada cuaca buruk dan keadaan laut. Defendan mendakwa bahawa ini menyebabkan penghentian kerja.

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- A** **Diputuskan**, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan dengan kos:
- B** (1) Walaupun majikan utama mempunyai kuasa untuk menolak kapal-kapal dan ia adalah tanggungjawab plaintif untuk mendapatkan kapal-kapal yang sesuai, ini perlu dilihat dalam konteks tiada isu dibangkitkan atas kelewatan yang dimaksudkan terutamanya apabila kerja di luar pesisir hanya bermula pada 18 Oktober 2013 (lihat perenggan 10).
- C** (2) Cuaca di akhir bulan November hingga ke pertengahan Disember 2013 adalah buruk menyebabkan tiada kerja luar pesisir dilakukan. Kesemua keadaan ini bersama dengan surat defendan sendiri kepada TLO mencadangkan pemberhentian sementara akibat cuaca buruk dan keadaan laut membuat permohonan bagi pemberhentian sementara munasabah kerana ia adalah berdasarkan atas keterangan konkrit mengenai keadaan cuaca buruk. Di bawah keadaan tidak pernah terdapat apa-apa niat penghentian atau penolakan oleh plaintif atau menawarkan kepada defendan untuk mengambil alih kerja seperti yang dicadangkan oleh defendan. Tidak terdapat penolakan mutlak oleh plaintif untuk melaksanakan kerja dengan itu defendan boleh menganggapnya sebagai dilepaskan (lihat perenggan 19 & 25).
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- E**
- F** (3) Mengenai sama ada surat defendan bertarikh 13 Disember 2013 merupakan penamatan, DW3 mengaku tidak terdapat surat penamatan yang dikeluarkan oleh defendan kepada plaintif mengakhiri/menamatkan kontrak tersebut. Walaupun ia dapat dikatakan adalah surat penamatan, defendan tidak berjustifikasi dalam menamatkannya kerana plaintif hanya memohon untuk pemberhentian sementara dalam menghadapi cuaca buruk. Memandangkan tidak terdapat penolakan atau penghentian kerja oleh plaintif, ia tidak layak ke atas defendan untuk menegaskan yang ia berhak untuk menerima penolakan dan menuntut kesemua ganti rugi (lihat perenggan 26).
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- H** (4) Plaintif tidak melanggar SA memandangkan tidak terdapat kelewatan pada kerja di darat dan ia tidak dapat menyelesaikan kerja luar pesisir akibat cuaca. Hanya terdapat pemberhentian sementara dan bukan penghentian kerja. Tidak terdapat penamatan oleh defendan memberikan ia hak untuk melantik kontraktor pihak ketiga HSAP Sdn Bhd. Award kerja kepada kontraktor pihak ketiga telah menafikan plaintif baki bayaran kerja. Memandangkan plaintif adalah bersedia dan sanggup untuk menyambungkan kerja luar pesisir sebaik saja cuaca bertambah baik seperti surat 13 Disember 2013 nya, ia berhak kepada faedah SA tersebut (lihat perenggan 27–28).]
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Notes

For cases on breach, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3880–3918.

Cases referred to

Max-Benefit Sdn Bhd v Phuah Thean An & Anor [2001] 1 MLJ 553, HC (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291; [1985] CLJ Rep 266, SC (refd)
UB Co Management Sdn Bhd v Perbadanan Kilang Felda [1997] MLJU 240; [1998] 5 CLJ 798, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Vasudevan Appu (Sarawanan Verrappan with him) (Vasudevan A & Co) for the plaintiff.
Andrew Heng (Mohd Shahir Mohd Tahir with him) (Zain Megat & Murad) for the respondent.

See Mee Chun J:**PARTIES AND CLAIM**

[1] Pursuant to letter of award dated 28 June 2013 (LOA B1 46–49) the plaintiff had been appointed by the defendant as the subcontractor for rock dumping works at the sea designated under the defendant's project known as 'Provision of 24' DIA ANDRA-A/TCOT Shore Approach Pipeline Installation for Rock Dumping Work ('work'). The plaintiff was required to provide and mobilise personnel, machinery and vessel spread for the onshore and offshore rock dumping work for a lump sum price of RM8.75m. The defendant had in turn been appointed by TLO Offshore S/B ('TLO') with the ultimate employer being Petronas Carigali S/B ('PCSB').

[2] This is the plaintiff's claim for the balance sum for work done amounting to RM6,937,500. It is not disputed the plaintiff had been paid RM1,872,500. The claim was resisted by the defendant alleging a breach of contract and the defendant has counterclaimed for the cost of completion.

[3] Witnesses for the plaintiff were Kamal Saraf bin Mohd Rashidi ('PW1', managing director) and witness statement marked as WSP1; Engku Ahmad Fared bin Engku Mustaffa ('PW2', general manager) and witness statement marked as WSP2; Dzulkifli bin Mohd Noh ('PW3', Project Marine Consultant) and witness statement marked as WSP3; and Azman Abd Samad ('PW4', survey party chief) and witness statement marked as WSP4. Witnesses for the defendant were Muhammad Firdaus Mohd Zamani ('DW1', field engineer) and witness statement marked as WSD1; Wong Siew Fook @ Francis (DW2, Managing Director HSAP Sdn Bhd), Kamalukhair Abdullah ('DW3',

- A chief executive officer) and witness statement marked as WSD3; and Shaik Marzizi Shaikh A Rahim ('DW4', operation manager) and witness statement marked as WSD4.

PRIMARY ISSUE

- B [4] The primary issue is whether the plaintiff is entitled to the full payment under LOA and as such to the outstanding balance and whether it had been in breach.

C WHETHER THE PLAINTIFF HAD COMPLETED WORK

- D [5] The LOA was issued to the plaintiff based on the plaintiff's proposal via its letter dated 25 June 2013 (B1 51–56). It is clear from the words in para 2 of LOA that the issuance of LOA is based on the given scope of work and contractor's proposal dated 25 June 2013 and as confirmed by the evidence of PW1. Paragraph 2 of LOA states that 'the issuance of this Letter of Award ('LOA') is based on the given scope of work and Contractor's proposal dated 25th June 2013'. In Q&A 5 of WSP1 PW1 in response to the question whether 'the LA contains the full terms of the contract answered 'No. The above LA was issued by Defendant based on Plaintiff's proposal dated 25-6-2013 which also contained the scope of work to be done by Plaintiff'.'

- F [6] This means LOA and the plaintiff's letter of proposal are to be read together. The time of completion of work was stated in B1 55 to be from 5 July–20 August 2013. It was PW1's evidence the time of completion was revised to 5 November 2013 for onshore work and 4 November 2013 for offshore work (B3 4–5) and then to 3 December 2013 and 29 November 2013 respectively (B3 9–10). There was no evidence to refute this and it follows there had been a revision of the completion dates.

- H [7] The evidence in the form of close out report for onshore work shows it to be completed on 15 September 2013 (B4 57). It reads '... has successfully completed the onshore dumping construction works which start from 6th July 2013 until 15th September 2013'. Thus onshore work had been completed within the revised completion date.

- I [8] It is not disputed offshore work had not been completed when the plaintiff left the site in mid February 2014 with the dispute being whether it was temporary demobilisation or abandonment. Hence insofar as offshore work is concerned there had been a delay by the time the plaintiff left the site in mid February 2014.

DELAY IN APPROVAL OF VESSEL

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[9] The contention of the plaintiff was the delay in commencement of work was caused by the ultimate employer not approving the vessel proposed by the plaintiff to carry out the work. The plaintiff had originally proposed Lunar Sinar which was rejected and then Ombak Biru 1 ('OB1') which was also rejected. It was also PW1 evidence OB1 had been rejected around 23 July 2013. The letter dated 27 August 2013 (B3 3) referred to by the plaintiff shows as at that date the plaintiff was 'closing out the marine punch list to meet the standard practice' and that 'OB1 has a commitment early September'. This would show as at 27 August 2013 Lunar Sinar was not ready and OB1 not available. The plaintiff had relied on the evidence of DW1 who had inspected OB1 before work started that it had been rejected by PCSB due to the punch list. According to the plaintiff their hands were tied due to the rejection from PCSB. Rejection by PCSB has a bearing as without their consent the vessel cannot be used (p 257 of 370 NOP). The rejection of OB1 by PCSB was therefore relevant although it was not available as at September as the completion date had been revised.

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[10] In this regard PW1 had stated the dates in the proposal were revised as the proposal was based on a particular vessel and as the vessel had been rejected it was agreed the time for completion would be revised. Refer to p 33 of 370 NOP. Although there was no specific document stating revision was due to rejection it is probable it was due to this reason more so when PW1 stated the plaintiff had to absorb the costs entailed. Thus although the ultimate employer had the authority to reject vessels and it was the plaintiff's responsibility to procure suitable vessels this must be viewed in the context of no issue being raised on the purported delay especially when offshore work only commenced on 18 October 2013. Refer to letter dated 13 October 2013 from the defendant to TLO (B3 6) that 18 October 2013 was for 'sail out to site, drop anchor and start work'.

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[11] Thus any delay due to the rejection of vessels by PCSB had an impact on the revised completion date.

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TEMPORARY DEMOBILISATION OR ABANDONMENT?

Weather

[12] The next issue to consider is whether there had been temporary demobilisation of work as contended by the plaintiff as opposed to abandonment. It is not disputed the plaintiff had on 12 December 2013 (B1 34) wrote to the defendant of 'temporary site demobilization for offshore and onshore due to unfavorable weather and sea condition during the seasonal

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A North East monsoon periods' and 'shall resume operation until weather condition is permissible for the work expected between mid February to mid March 2014'.

B [13] The evidence is also clear although the suggestion was originally supported by the defendant (B1 95), this was eventually rejected by PCSB (B1 90) as 'the situation and weather are improving and we could possibly get a good window to complete the job'. This was conveyed to the plaintiff by the defendant's letter dated 13 December 2013 (B1 92–93) and for the plaintiff to
C 'continue making attempts to enter site whenever the weather permissible or proceed with rock berm construction in replacement of the offshore method'.

D [14] The plaintiff had relied on the evidence of PW3 its marine consultant on board the vessel that he attended a meeting on 10 December 2013 (B1 98–99) where he assessed the weather condition made it highly very dangerous and risky to do offshore work and that it was impossible to manoeuvre the vessel in rough seas which can damage the vessel and endanger the life of everyone on board. According to PW3 his assessment was accepted by everyone at the meeting. In cross-examination PW3 stated LCT vessel had its marine representative as did PCSB, TLO and the defendant and all were on board the vessel. The decision to stop work on any particular day due to weather is a collective decision of all parties and the captain of the vessel. He agreed from the minutes there was no conclusion to stop work due to the weather. In
E re-examination as to whether he would have continued work if asked he said he
F would have to assess the situation.

G [15] PW3's evidence on the assessment of the weather making it highly dangerous and risky and endangering life and vessel to have been accepted by those present was not recorded in the minutes of meeting of 10 December 2013. Neither was it recorded there was a conclusion to stop work. What was recorded as per item 1.0.5 was that 'the final decision on the way forward and temporary demob will be subject to PCSB KL Office approval'.

H [16] However the fact of the weather must have weighed heavily on all parties thereby necessitating the meeting to address the way forward. The sequence of events in the defendant's letter to TLO dated 11 December 2013 (B1 35–39) showed it had proposed temporary demobilisation. This letter states as follows:

I SUBCONTRACTOR duly regret to inform CONTRACTOR of temporary site demobilization for offshore and onshore due to unfavorable weather and sea condition during the seasonal North East monsoon periods. Referring to the weather forecast report, it is foreseen that the weather and sea condition shall prolong and may elongate until the end of the monsoon season. Therefore, vessel and operation of rock dumping are deemed not safe within this period.

This was then followed by the plaintiff's letter to the defendant dated 13 December 2013 which was ultimately rejected. However the fact remains that the defendant had supported the plaintiff's request for temporary demobilisation as evident from DW3's evidence. Refer to p 340 of 370.

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[17] The plaintiff's letter to the defendant dated 13 December 2013 as in B1 63 bears reproduction. It reads as follows:

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We TIDEWAY ALLIANCE SDN BHD as SUBCONTRACTOR duly regret to inform DAYA OCI SDN BHD as CONTRACTOR of temporary site demobilization for offshore and onshore due to unfavorable weather and sea condition during the seasonal North East monsoon periods.

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Referring to the weather forecast report, it is foreseen that the weather and sea condition shall prolong and may elongate until the end of the monsoon season. Therefore, vessel and operation of rock dumping are not safe within this period.

SUBCONTRACTOR shall demobilize temporarily marine spread and onshore facilities and shall resume remaining operation until weather condition is permissible for the work expected between Mid February to Mid March 2014.

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The rejection by PCSB as per email in B1 90 was due to 'situation and weather are improving at site and we could possibly get a good window to complete the job'. The rejection was conveyed to the plaintiff by the defendant via letter dated 13 December 2013 (B1 92-93) that:

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For your information, the proposal of temporary demobilization of marine spread and onshore facilities was not approved by TLO and PCSB (refer to attached email from PCSB). TLO/PCSB is still insisting us to continue making attempts to enter site whenever the weather permissible or proceed with rock term construction in replacement of the offshore method.

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[18] The close out report for offshore work at B4 73 for 28 November 2013 stated 'long swell and strong current' and for 29 November-12 December 2013 has the note 'Standby due to bad weather condition'.

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[19] Undoubtedly the weather in late November to mid December 2013 was bad prompting no offshore work to be done. All these circumstances coupled with the defendant's own letter to TLO proposing temporary demobilisation due to unfavorable weather and sea condition in B1 35-39 makes the request for temporary demobilisation reasonable as it was based on concrete evidence of bad weather condition.

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Take over of site or offer to take over work?

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[20] In the same letter dated 13 December 2013 to the plaintiff, the defendant had also stated:

- A** Based on discussion today with Mr. Fairuz from TASB, he has highlighted that TASB will not be able to follow TLO/PCSB instruction to start the construction of rock berm immediately upon demobilization of the marine spread due to several limitations. This situation may lead to the risk of DOCI contract be terminated and taken over by TLO. As such DOCI has no choice but to continue and complete the remaining scope left by TASB by itself or by appointing another subcontractor.
- B**

Next comes the email from the plaintiff to the defendant dated 14 December 2013 (B1 101–102) which reads as follows:

- C** We hereby offering Daya OCi to take over and continue renting all TCOT/PCSB approved equipment and facilities with related to Onshore Rock Dumping Work or otherwise we will terminate and remove ROW Site Office with effect from 15th December 2013.

- D** The same email can be found in B4 42–43.

[21] To the defendant this was an offer by the plaintiff for it to take over the work and thus constituted an abandonment of work.

- E** [22] PW2 had written the email of 14 December 2013 and in Q&A 9 of WSP2 said he was involved in the discussion with DW4 in handing over the site office and equipment to the defendant and ‘it was mutually agreed that the Defendant would take over the site office and the equipments and pay rental to the respective owners since the Plaintiff could not absorb the high expenses involved while waiting idly for the weather to improve’.
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Q&A 10 is as follows:

- G** Q10. Did the agreement involve the Plaintiff surrendering the operations and on shore and off shore works to the Defendant?
- A10. No. It involved only the site office cabin and the equipments, not the operation or works under Letter of Award. The Plaintiff felt that it was not commercially viable to maintain the cabin which was being used as the site office and the equipments on site since the onshore and offshore rock dumping works cannot be carried out until mid February or March 2014 due to the weather condition.
- H**

The Plaintiff was still ready and willing to resume the rock dumping works when the weather permits.

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In cross-examination PW2 stated with reference to the email of 14 December 2013, the taking over of site was discussed and concluded at a meeting on 13

December 2013 and not via the email. He was not present at the meeting whereby the plaintiff's representative was one Mr Fairuz. It was put to him he wouldn't know if the meeting was to hand over the office or to take over the whole rock dumping to which he agreed but not before saying 'the instruction received from Encik Fairuz is to hand over the site office' (p 172 of 370 NOP).

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[23] Although PW2 was not present at that meeting the instruction he received was to hand over the site office. Accordingly the email reflects that it was an offer to take over approved equipment and facilities related to onshore work. This would be the more probable reason given the specific reference to onshore work in that email and the fact that onshore work had been completed on 15 September 2013. The fact of Mr Fairuz not being called as a witness does not therefore attract the invoking of s 114(g) of the Evidence Act 1950. Further the fact that plaintiff had completed the onshore work and overall completion was 75% as claimed by them would render it not probable they would walk out of work.

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[24] As to the evidence of DW3 that temporary demobilisation does not exist in the oil and gas industry, it is his only his say-so unsupported by any documents. DW3 had stated the site office although only a container office represents presence and the moment that is taken out you are no longer there. However DW1 was not sure during the time the third party contractor was doing the offshore work who was maintaining the site office; whether it was HSAP or the defendant. Refer to p 264 of 370 NOP. This negates whatever significance DW3 had attributed to the site office.

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[25] Under the circumstances there was never any intention of abandonment or repudiation by the plaintiff or offer to the defendant to take over the work as suggested by the defendant. There was no absolute refusal by the plaintiff to perform the work such that the defendant can treat itself as discharged. Refer to *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291; [1985] CLJ Rep 266 where at p 294 (MLJ); p 270 (CLJ) is stated:

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... If there is an absolute refusal to perform, the other party may treat himself as discharged. Short of an express refusal, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions ...

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TERMINATION

[26] As to whether the defendant's letter of 13 December 2013 (B1 40–41) amounted to termination DW3 had referred to paras 1–3 of the said letter to say there was a termination but finally conceded there was no termination letter issued by the defendant to the plaintiff ending/terminating the contract. Refer to p 330 of 370 NOP. As termination attracts the consequence of cl 16 of LOA

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- A** on costs including that of appointing third party contractor it must be clear and unequivocal of which the letter of 13 December 2013 was not. Even if it can be said to be a termination letter the defendant was not justified in terminating as the plaintiff had only requested for temporary demobilisation in the face of bad weather. As there had been no repudiation or abandonment of work by the
- B** plaintiff, it does not lie on the defendant to assert it is entitled to accept the repudiation and claim all damages.

Paragraphs 1–3 of the letter state:

- C** For your information, the proposal of temporary demobilization of marine spread and onshore facilities was not approved by TLO and PCSB (refer to attached email from PCSB). TLO/PCSB is still insisting us to continue making attempts to enter site whenever the weather permissible or proceed with rock berm construction in replacement of the offshore method.
- D** Based on discussion today with Mr. Fairuz from TASB, he has highlighted that TASB will not be able to follow TLO/PCSB instruction to start the construction of rock berm immediately upon demobilization of the marine spread due to several limitations. This situation may lead to the risk of DOCI contract be terminated and taken over by TLO. As such DOCI has no choice but to continue and complete the remaining scope left by TASB by itself or by appointing another subcontractor ...
- E** Please be advised that as per the clause 16(b) of LOA, (Letter of Award) from DOCI to TASB dated 28th June 2013, payment to TASB shall be reduced by all costs incurred by DOCI in completing the remaining scope.

FINDING

- F** [27] The plaintiff had therefore not breached the LOA as there was no delay on onshore work and it had not been able to complete offshore work due to the weather. There had only been temporary demobilisation and no abandonment of work. There had been no termination by the defendant entitling it to
- G** appoint the third party contractor HSAP Sdn Bhd. The award of the work to the third party contractor had denied the plaintiff the balance payment of the work.

- H** [28] Since the plaintiff was ready and willing to resume the offshore work once the weather improved as per its letter of 13 December 2013, it is entitled to the benefit of the LOA.

EXTENT OF COMPLETION

- I** [29] The evidence of PW4 who prepared the survey report in B1 67–78 shows that offshore work was completed for 46m while another 20m was ‘complete patch up’ and 26m ‘dumped’ but pending MBES (multibeam echo sounder) survey and that MBES was not done due to bad weather. His basis for saying 75% of work had been completed was that the total length was 150m

and rock was already dumped 118m which is more than half of the 150m and because there is offshore and onshore portion to complete rock dumping he expected 50% onshore to be completed; half of offshore is 25% and therefore total completed is 75%. In cross-examination he agreed that his basis for saying 50% onshore to be completed was speculative; without MBES there is no basis for saying the 20m and 26m had been patched and 46m is less than one third of offshore work. In re examination on the 75% he explained the rocks dumped at the area could be seen visually. He cross-referred to B1 77 for KP 164.121 to 164.161 where orange indicates rock and then to B1 67 to the 40m and the other 20m which is complete patch up.

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[30] Upon perusing B1 67 and cross-referring to p 77 it does show the 26m which had the words 'dumped' falls within the 40m where the orange indicates rock and similarly the 20m with the words 'complete patch up' falls within the orange indicating rock. This would show that 26m and 20m of offshore work had been done and all that was needed was for MBES to confirm the fact. A total of 46m + 26m + 20m = 92m of offshore work had been completed. This does not constitute 1/3 of offshore work as alleged by the defendant and coupled with onshore work being completed would render PW4's assessment of 75% of overall work completed being probable.

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ASSIGNMENT

[31] It is not disputed that there was a consent to assignment dated 20 August 2013 (B1 80–81) and a notice of assignment dated 28 August 2013 (B1 82–83). The relevant part of the notice of assignment from UOB to the defendant reads:

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Please take note that the above-mentioned Supplier has assigned all their present and future trade debts in connection with the Contract to United Overseas Bank (Malaysia) Bhd ('UOBM') under a factoring agreement with UOBM relating to the UOBM *Factor Facility*.

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Pursuant thereto, you have to pay to the above-mentioned Supplier's UOBM account all present and future amounts due in respect of the Supplier's invoices in connection with the Contract, without set-off and counterclaim ...

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...

We note from the Contract that consent from your company should be obtained for any assignment of interest in the Contract. We would therefore like to seek your consent to the assignment of the invoices due from your company under the Contract to United Overseas Bank (Malaysia) Bhd.

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It was thus contended by the defendant that pursuant to the assignment the plaintiff could not commence the claim against the defendant.

- A [32] The wording of the assignment notice and the consent to assignment shows that the assignment concerned the invoices, and not the whole payment/interest under the LOA. It is not disputed the plaintiff had only issued two invoices for the total amount of RM5,250,000 for which the defendant had paid RM1,812,500 directly to the plaintiff instead of paying to UOB as provided under the assignment notice. In *UB Co Management Sdn Bhd v Perbadanan Kilang Felda* [1997] MLJU 240; [1998] 5 CLJ 798 where at held [1] it is stated:
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- C The assignment under the deed of assignment was in respect of certified progress payments. The plaintiffs are suing for the balance which was not been certified as due and payable to Penaga. Clearly, therefore, that balance does not fall within the description of the thing assigned to the plaintiffs.

- D [33] The assignment does not appear to be absolute but conditional as it was for the purpose of securing a loan facility. The assignment would come to an end once the plaintiff repaid the loan. Refer to *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1 MLJ 553 where at held [1]:

- E Although the assignment was stated to be absolute, in effect it was not. The assignment was purely for the purpose of securing the loan. The implication is that the assignment of the equitable chose in action would come to an end and it would revert back to the assignors on one of the events taking place. The first event is where the loan is fully repaid ... The assignment of the equitable estate in the property was thus conditional. Since there was no absolute assignment, the plaintiffs had locus standi to sue the defendant.

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- [34] In any event UOB has by letter dated 21 August 2015 (P1) consented to the plaintiff to commence the case.

G CHARTER OF LCT TRANSPORTER

- H [35] With regard to the charter of LCT Transporter the undisputed evidence is that the defendant had chartered the LCT and then sub chartered to the plaintiff and the charter fees had been paid by the defendant to the owner. PW1 agreed that the plaintiff had difficulties in paying the charter fees and had requested the defendant to pay for the charter costs 'but it was not recorded that Defendant bear the cost of the charter, so called advance the charter for this vessel and it will be deducted from our invoices later'. However PW1 did agree that whatever the plaintiff is claiming in this suit must be subjected to the repayment of the charter. Given that it was the plaintiff's responsibility to secure the vessel of which the defendant had subchartered to the plaintiff it follows the plaintiff must bear the costs of charter which were summarised in B4 6–7 with the supporting invoices.
- I

CONCLUSION

[36] In conclusion the plaintiff's claim minus the cost of transporter charter of RM2,001,953.56 is allowed and the defendant's counterclaim is dismissed. Costs to the plaintiff.

Plaintiff's claim allowed and defendant's counterclaim dismissed with costs.

Reported by Kanesh Sundrum

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